A

# MINISTER OF HUMAN RESOURCES, MALAYSIA v. DIAMET KLANG (MALAYSIA) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
CLEMENT SKINNER JCA
B ABDUL AZIZ ABDUL RAHIM JCA
[CIVIL APPEALS NO: W-01-452-2011 & W-01-454-2011]
8 JULY 2013

C ***LABOUR LAW:*** *Trade union – Recognition – Recognition to represent workers of company – Whether decision of competency made by Director of Industrial Relations ('DGIR') – Whether DGIR had power to make decision – Whether Minister could decide on issue of competency based on reports of DGIR*

D ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Certiorari – Recognition of trade Union – Competency – Procedures of law – Whether Minister erred in finding that Union was competent to represent workers of company*

E The respondent ('company') filed an application for an order of *certiorari* to quash the decision of the Minister of Human Resources ('Minister') who accorded recognition to the National Union of Transport Equipment and Allied Industries Workers ('Union') to represent the workers of the company ('the said decision'). The arguments put forth to challenge the decision of the Minister was that the Minister did not make the decision on the competency issue but the decision was made by the Director General of Industrial Relations ('DGIR'). It was also argued that at the material time when the
F decision was made, the power to make such decision was removed from the DGIR by virtue of the Amending Act A1322 with effect from 28 February 2008. As such, the power to decide resided solely with the Minister. Apart from that, the company argued that even if the decision was made within the purview of the law, the Minister was wrong in finding that the Union was competent to represent the workers of the company. The High Court ('HC')
G found that perversity was established. Therefore the HC had the jurisdiction to intervene in favour of the company on the grounds that the Minister had failed to have proper regard to the fact that the Union's competence was limited to employers who were engaged in the manufacturing, assembly and repairing motor vehicle, motorcycles, bicycle, tractors, bulldozers and parts.
H The HC held that although the DGIR had done an extensive study and decided that the company's scope of work had fallen within the ambit of the Union, it could be seen from the affidavit of the company that the company was only manufacturers of components and sub-components and that the majority of these were not meant for the automotive industry. As such, the
I HC allowed the company's application for judicial review and quashed the decision of the Minister. Dissatisfied, the appellants appealed against the decision of the HC. In their grounds of appeal, the Minister and the Union stated that the High Court Judge ('HCJ') had erred in law and in fact in

holding, *inter alia,* that (i) the Minister had failed to consider that the competency of the Union was limited to employers who were engaged in the manufacturing, assembly and repairing motor vehicles, motorcycles, bicycles, tractors, bulldozers and parts; (ii) the Minister had decided based on the decision made by the DGIR regarding the competency of the Union; (iii) since the company was only a manufacturer of components and sub-components and that only 46% were sub-components which could be used in the automotive industry and that the majority were not meant for the automotive industry, the Minister's finding of competency in favour of the Union was perverse. The issues that arose for the court's determination were (i) whether the Minister had applied his mind independently in arriving at his decision to accord recognition to the Union to represent the company's employees; (ii) whether the Union was competent to represent the employees of the company and that the Minister was correct in deciding the competency issue in favour of the Union; and (iii) whether the Minister's decision was tainted with impropriety and illegality in taking into consideration irrelevant matters.

**Held (allowing appeals with costs):**
**Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:**

**(1)** The Minister had given consideration to the fact that there was secret ballot taken after discussions between the interested parties to determine the wishes of the company's employees to be represented by the Union and the fact that the discussion prior to the secret balloting was attended by representative of the Union and the company. The Minister had also given consideration to the report by the Director General of Trade Union ('DGTU')/DGIR and all the relevant information and facts contained in the report. There was no wrong in the act of the Minister to rely on the report by the DGTU/DGIR in arriving at his decision to accord recognition to the Union as long as the Minister had applied his mind independently as to the contents of the report. The judge had not offered any reason why the Minister could not rely on the report by the DGTU/DGIR. As such, HCJ had failed to give sufficient consideration to the averments by the Minister in his affidavit. Had the HCJ direct his mind to the averments, the HCJ would have noticed that the Minister had in fact taken into consideration all relevant factors in arriving at his decision to accord recognition to the Union to represent the company's employees. (paras 12, 16 & 17)

**(2)** There was no reason to fault the Minister's decision as being improper or unreasonable and in breach of the *Wednesbury* principles in the decision making process. The Minister had also considered reg. 3(1) of the Union's Regulations as to the trades and class of employees that the Union could represent, the DGTU/DGIR in conducting the enquiries and the secret ballot was performing an administrative function to ascertain facts for consideration of the Minister. Therefore, the HCJ had erred in his conclusion on this issue. (paras 12 & 18)

**(3)** On the issue of competency, HCJ had acknowledged that the DGTU/DGIR 'had apparently done quite an extensive study on the matter and had decided that the company's scope of work had fallen within the ambit of the Union. It was not open to the HCJ to arrive at a decision which was completely the opposite. The conclusion by the DGTU/DGIR in their report to the Minister that the scope of work of the company falls within the ambit of the Union's representation was a matter of fact. The HCJ in rejecting this finding of fact by the DGTU/DGIR had not given any reason for saying so except to refer to year 2008 breakdown figures on the products given by the company to conclude that the majority of the components and sub-components were not meant for automotive industry. (paras 12 & 19)

**(4)** The company had agreed to a secret ballot being conducted or taken to determine whether the employees were agreeable to be represented by the Union. The result of the secret ballot showed that 77.3% of those employees agreed to be represented by the Union. The company did not complain about the conduct or the result of the secret ballot. The HCJ had not given due consideration to the result of the secret ballot which favoured the Union to represent the company's employees. (para 20)

**(5)** The breakdown of the figures was not the determinative factor. The breakdown figures showed that the percentage of the company's products manufactured as automobile and motorcycles parts was almost half of the total production in 2008. One of the facts that was ignored by the HCJ was that the main activity of the company was to produce 15 types of sub-components which would be used in automotive parts or components. This fact coupled with other facts such as the result of the enquiry and the secret ballot would have provided the Minister with sufficient relevant factors to consider in making his decision. (para 23)

**(6)** In substituting the finding of fact as to the competency by the DGTU/DGIR with his own, HCJ had stepped beyond the realm of judicial review and descended into the arena of an appeal. The HC in a judicial review, was exercising its inherent supervisory jurisdiction over an inferior tribunal of limited jurisdiction and not sitting as an appellate court to review the findings of the inferior tribunal. In a judicial review the court was not concerned with the decision made, unless *prima facie* the decision was illegal or in contravention of any provision of any law. Merely because the inferior tribunal got its decision wrong, it was insufficient for the HC sitting in a judicial review to interfere and substitute that inferior tribunal's decision. (para 25)

**(7)** The HCJ should have found that there was no impropriety or unreasonableness in the decision by the Minister to accord recognition to the Union to represent the company's employees. The HCJ should give effect to s. 9(6) of the Act as to the conclusiveness and finality of

the Ministerial decision on competency. Therefore the courts should be slow to find fault with the Minister's decision in exercising his discretion to accord recognition to a Union of workers. (paras 26, 27 & 28)

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden ('syarikat') telah memfailkan permohonan untuk mendapatkan perintah *certiorari* untuk membatalkan keputusan Menteri Sumber Manusia ('Menteri') yang memberikan pengiktirafan kepada Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Alat-alat Pengangkutan dan Sekutu ('Kesatuan') untuk mewakili pekerja-pekerja syarikat (keputusan tersebut). Hujahan yang dikemukakan untuk mencabar keputusan Menteri adalah bahawa Menteri tidak membuat keputusan mengenai isu kompetensi tetapi keputusan tersebut telah dibuat oleh Ketua Pengarah Perhubungan Perusahaan ('KPPP'). Dihujahkan lagi bahawa pada masa material keputusan tersebut dibuat, kuasa untuk membuat keputusan sedemikian telah disingkirkan daripada KPPP menurut Akta Pindaan A1322 yang berkuatkuasa mulai 28 Februari 2008. Oleh itu, kuasa untuk membuat keputusan hanya ada pada Menteri. Selain itu, syarikat menegaskan bahawa walaupun keputusan tersebut dibuat dalam skop undang-undang, Menteri terkhilaf dalam membuat dapatan bahawa Kesatuan kompeten untuk mewakili pekerja-pekerja syarikat. Mahkamah Tinggi ('MT') mendapati bahawa percanggahan telah terbukti. Oleh itu, MT mempunyai bidang kuasa rayuan untuk campur tangan bagi pihak syarikat atas alasan bahawa Menteri telah gagal untuk mempertimbangkan fakta bahawa kekompetenan Kesatuan terhad kepada majikan yang terlibat dalam pengeluaran, pemasangan dan membaiki kenderaan bermotor, motosikal, basikal, traktor, jentolak dan alat ganti. MT mendapati bahawa walaupun KPPP telah melakukan kajian yang meluas dan memutuskan bahawa skop kerja syarikat terangkum di bawah lingkungan Kesatuan, dan boleh dilihat daripada afidavit syarikat bahawa syarikat hanya mengeluarkan komponen dan sub-komponen dan bahawa kebanyakannya bukan untuk industri automotif. Justeru, MT membenarkan permohonan syarikat untuk semakan kehakiman dan membatalkan keputusan Menteri. Terkilan, perayu-perayu merayu terhadap keputusan MT. Dalam alasan-alasan rayuan, Menteri dan Kesatuan menyatakan bahawa Hakim Mahkamah Tinggi ('HMT') telah terkhilaf dari segi undang-undang dan fakta dalam memutuskan, antara lain, bahawa (i) Menteri telah gagal mempertimbangkan bahawa kekompetenan Kesatuan adalah terhad kepada majikan yang terlibat dalam pengeluaran, pemasangan dan membaik pulih kenderaan bermotor, motosikal, basikal, traktor, jentolak dan alat ganti; (ii) Menteri telah membuat keputusan berdasarkan keputusan yang dibuat oleh KPPP mengenai kekompetenan Kesatuan; (iii) oleh kerana syarikat hanya merupakan pengeluar komponen dan sub-komponen dan bahawa hanya 46% adalah sub-komponen yang boleh digunakan dalam industri automotif dan bahawa majoritinya tidak digunakan untuk industri automotif, dapatan Menteri bahawa kekompetenan berpihak

kepada Kesatuan adalah bercanggah. Isu-isu yang dibangkitkan untuk penentuan mahkamah adalah (i) sama ada Menteri telah membuat keputusannya secara bebas dalam mencapai keputusan memberikan pengiktirafan kepada Kesatuan untuk mewakili pekerja-pekerja syarikat; (ii) sama ada Kesatuan berkompetensi untuk mewakili pekerja-pekerja syarikat dan bahawa Menteri betul dalam memutuskan isu kompetenan memihak kepada Kesatuan; dan (iii) sama ada keputusan Menteri menyalahi undang-undang dengan mengambil kira perkara-perkara yang tidak relevan.

**Diputuskan (membenarkan rayuan-rayuan dengan kos):**
**Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:**

**(1)** Menteri telah memberikan pertimbangan kepada fakta bahawa terdapat pengundian rahsia yang diambil selepas perbincangan antara pihak-pihak yang berkepentingan untuk menentukan kehendak pekerja-pekerja syarikat yang diwakili oleh Kesatuan dan fakta bahawa perbincangan sebelum pengundian rahsia telah dihadiri oleh wakil Kesatuan dan syarikat. Menteri juga telah memberi pertimbangan kepada laporan yang disediakan oleh Ketua Pengarah Kesatuan Sekerja ('KPKS')/KPPP dan semua maklumat yang berkaitan dan fakta-fakta yang terkandung dalam laporan tersebut. Tiada kekhilafan dalam tindakan Menteri untuk bergantung kepada laporan oleh KPKS/KPPP dalam membuat keputusan memberi pengiktirafan kepada Kesatuan selagi Menteri telah menumpukan pemikirannya secara bebas tentang kandungan laporan tersebut. Hakim gagal memberikan sebarang sebab mengapa Menteri tidak boleh bergantung kepada laporan yang disediakan oleh KPKS/KPPP. Oleh itu, HMT gagal memberi pertimbangan yang secukupnya kepada penyataan oleh Menteri dalam afidavitnya. Oleh itu, HMT gagal memberikan pertimbangan yang sewajarnya kepada penyataan oleh Menteri dalam afidavitnya. Sekiranya HMT telah dengan sewajarnya mempertimbangkan penyataan tersebut, HMT akan menyedari bahawa Menteri telah mengambil kira faktor-faktor relevan dalam membuat keputusan untuk memberi pengiktirafan kepada Kesatuan untuk mewakili pekerja-pekerja syarikat.

**(2)** Tiada sebab untuk menyalahkan keputusan Menteri sebagai tidak wajar atau tidak munasabah dan melanggar prinsip-prinsip *Wednesbury* dalam proses mencapai keputusan. Menteri juga telah mempertimbangkan per. 3(1) Peraturan-Peraturan Kesatuan tentang perdagangan dan tahap pekerja-pekerja yang boleh diwakili oleh Kesatuan, KPKS/KPPP dalam mengendalikan inkuiri dan pengundian rahsia menjalankan fungsi pentadbiran bagi menentukan fakta-fakta untuk pertimbangan Menteri. Oleh itu, HMT telah terkhilaf dalam kesimpulan beliau mengenai isu ini.

**(3)** Mengenai isu kekompetenan, HMT telah mengakui bahawa KPKS/KPPP telah melakukan kajian yang mendalam dan telah memutuskan bahawa skop kerja syarikat terangkum di bawah lingkungan Kesatuan. HMT tidak boleh membuat keputusan yang bertentangan. Kesimpulan oleh KPKS/KPPP dalam laporan mereka kepada Menteri bahawa skop kerja syarikat terangkum di bawah lingkungan perwakilan Kesatuan adalah perkara fakta. HMT dalam menolak dapatan fakta oleh KPKS/KPPP gagal memberi sebarang alasan untuk berbuat demikian kecuali merujuk kepada pecahan angka produk-produk tahun 2008 yang diberikan oleh syarikat untuk membuat kesimpulan bahawa majoriti komponen dan sub-komponen tidak diniatkan untuk industri automotif.

**(4)** Syarikat telah bersetuju kepada satu undian rahsia dijalankan atau diambil untuk menentukan sama ada pekerja-pekerja bersetuju untuk diwakili Kesatuan. Keputusan pengundian rahsia menunjukkan bahawa 77.3% pekerja-pekerja bersetuju untuk diwakili Kesatuan. Syarikat tidak mengadu tentang pengendalian atau keputusan pengundian rahsia. HMT gagal mempertimbangkan dengan sewajarnya keputusan pengundian rahsia yang bersetuju dengan Kesatuan untuk mewakili pekerja-pekerja syarikat.

**(5)** Pecahan angka bukanlah faktor penentu. Pecahan angka menunjukkan bahawa peratusan produk syarikat yang dikeluarkan sebagai bahagian automotif dan motosikal adalah hampir separuh daripada jumlah pengeluaran pada tahun 2008. Salah satu fakta yang telah diabaikan oleh HMT adalah aktiviti utama syarikat iaitu penghasilan 15 jenis sub-komponen yang akan digunakan pada bahagian-bahagian atau komponen automotif. Fakta ini ditambah pula dengan fakta lain seperti hasil siasatan dan pengundian rahsia akan memberikan Menteri faktor-faktor yang mencukupi untuk dipertimbangkan dalam membuat keputusannya.

**(6)** Dalam menggantikan dapatan fakta mengenai kekompetenan KPKS/KPPP dengan dapatannya sendiri, HMT telah bertindak di luar bidang kuasa semakan kehakiman dan menurun ke arena rayuan. MT dalam semakan kehakiman, menjalankan bidang kuasa penyeliaan sedia ada ke atas suatu tribunal rendah yang mempunyai bidang kuasa yang terhad dan tidak bersidang sebagai mahkamah rayuan untuk mengkaji dapatan tribunal rendah. Dalam semakan kehakiman, mahkamah tidak menghiraukan keputusan yang dibuat, melainkan jika keputusan tersebut secara *prima facie* tidak sah atau melanggar mana-mana peruntukan undang-undang. Hanya kerana tribunal bawahan telah mencapai keputusan yang salah, tidak mencukupi untuk MT yang bersidang sebagai semakan kehakiman untuk campur tangan dan menggantikan keputusan tribunal bawahan.

**(7)** HMT harus membuat dapatan bahawa tiada pelanggaran prosedur atau ketidakmunasabahan dalam keputusan Menteri dalam memberi pengiktirafan kepada Kesatuan untuk mewakili pekerja-pekerja syarikat. HMT harus memberi kesan kepada s. 9(6) Akta berkenaan kemuktamadan keputusan Menteri terhadap kekompetenan. Oleh itu, mahkamah tidak sepatutnya campur tangan keputusan Menteri dalam menjalankan budi bicaranya untuk memberi pengiktirafan kepada Kesatuan pekerja.

**Case(s) referred to:**

*BP Chemical (M) Sdn Bhd v. Menteri Sumber Manusia & Anor (No. R3 (1)-25-72-07)* ***(refd)***

*Euromedical Industries Sdn Bhd lwn. Menteri Sumber Manusia & Yang Lain [1999] 5 CLJ 171 HC* ***(dist)***

*Holiday Villages Of Malaysia Sdn Bhd v. Menteri Sumber Manusia & Anor [2010] 7 CLJ 683 CA* ***(refd)***

*Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC* ***(refd)***

*Marulee (M) Sdn Bhd v. Menteri Sumber Manusia & Anor [2007] 5 CLJ 51 CA* ***(refd)***

*Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC* ***(refd)***

*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA* ***(refd)***

*Syarikat Emerald Tiles Sdn Bhd v. Menteri Buruh Dan Tenaga Rakyat & Anor (The Non-Metallic Mineral Products Manufacturing Employees Union, Intervener) [1994] 4 CLJ 906 HC* ***(refd)***

**Legislation referred to:**

Industrial Relations Act 1967, s. 9(3), (4), (4A), (4B), (4C), (5), (6)

*(Civil Appeal No: W-01-452-2011)*

*For the appellant - Rozielawaty Abd Ghani (Syarifah Fatimah Azura with her); SFCs*

*For the respondent - CM Lim (S Rutheran with him); M/s The Chambers of R Sivagnanam & Assoc*

*(Civil Appeal No: W-01-454-2011)*

*For the appellant - Chandrasegaran R; M/s Prem & Chandra*

*For the respondent - CM Lim (S Rutheran with him); M/s The Chambers of R Sivagnanam & Assoc*

*[Appeal from High Court, Kuala Lumpur; Judicial Reviews No: R1-25-379-10 & R1-25-379-10]*

*Reported by Sandra Gabriel*

## JUDGMENT

**Abdul Aziz Abdul Rahim JCA:**

**[1]** There are two related appeals before us. This appeal, Appeal No. W-01-452-2011 ("Appeal No. 452") and Appeal No. W-01-454-2011 ("Appeal No. 454"). Both appeals were heard together. Appeal No. 452 is

by the Minister of Human Resources Malaysia against the decision of High Court which allowed the applicant's application for judicial review to quash the decision of the Minister of Human Resources which has accorded recognition to the second respondent in the High Court and Appeal No. 454 is by National Union of Transport Equipment And Allied Industries Workers against the same decision. A B

**[2]** In Appeal No. 452, the appellant was the first respondent in the High Court and in Appeal No. 454 the appellant was the second respondent in the High Court. Both appellants are appealing against the same order of the High Court granting the respondent's application for judicial review. The respondent in both appeals was the applicant before the High Court. C

**[3]** For ease of reference the parties in these two appeals shall be referred to their respective names as in the record of appeals that is to say, the appellant in Appeal No. 452 shall be referred to as "the Minister" and the appellant in Appeal No. 454 ie, National Union of Transport Equipment And Allied Industries Workers shall be referred to as "the Union". The respondent in both appeals ie, Diamet Klang (Malaysia) Sdn Bhd shall be referred to as "the company". D

**[4]** The company had filed an application for an order of *certiorari* to quash the decision of the Minister who was alleged to have accorded recognition to the Union to represent the workers of the company. E

**[5]** The company challenges are as follows:

(i) That the Minister have not made the required decision on the competency issue. It was alleged by the company that the decision was made by the Director of Industrial Relations (the DGIR). It was also argued that at the material time when the decision was made on the matter, the power to make such decision had been removed from the DGIR by virtue of the Amending Act A1322 with effect from 28 February 2008. That power now resides as a result of the said amendment solely with the Minister. It was submitted that apart from acting on the decision that was made by the DGIR, the Minister did not make any decision on his own. F G

(ii) That even if the decision was made within the purview of the law, the Minister was wrong in finding that the Union was competent to represent the workers of the company. H

**[6]** The learned Senior Federal Counsel submitted that the Minister had acted within the bounds of his discretionary power and therefore his decision is final and shall not be questioned in any court by virtue of s. 9(6) of the Industrial Relations Act 1967. I

A **Findings Of The High Court**

**[7]** The High Court allowed the company's application for judicial review and quashed the decision of the Minister. The High Court found that by the time the decision was made by the Minister in 2009 the law had been amended whereby the role of the DGIR had been changed to that of merely
B ascertaining the circumstances pertaining to competence and not to decide on the same. The power to decide had been made to reside with the Minister only. The fact that the Minister had not exercised his mind in deciding the matter was quite clear in the submissions of the learned Senior Federal Counsel when it submitted thus:

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> 16. Berdasarkan maklumat-maklumat ini KPKS telah memutuskan bahawa pekerja Pemohon termasuk di bawah skop keanggotaan Responden Kedua dan dengan itu layak diwakili oleh Responden Kedua.
>
> 17. Responden Pertama menghujahkan di dalam kes ini apabila Responden Pertama menerima keputusan KPKS beliau telah
D melaksanakan kuasa budibicara tersebut secara *bona fide* tanpa apa-apa niat *mala fide*. Responden Pertama juga telah mengambilkira semua fakta dan perkara yang relevan yang dikemukakan sebelum membuat keputusan tersebut.

**[8]** It is the finding by the High Court that the Minister had acted and
E accepted the decision that was made by the DGIR when in law the DGIR by that time was no longer empowered by the law to make any decision on the issue of competency. As the Minister had acted on the decision of the DGIR that was tainted with illegality his decision must be deemed as tainted as well.

F **[9]** The Minister had also failed to have proper regard to the fact that the Union's competence is limited to employers who were engaged in the manufacturing, assembly and repairing motor vehicle, motorcycles, bicycles, tractors, bulldozers and parts. Again, the Minister had acted on the decision of the DGIR in this regard. The DGIR had apparently done quite an
G extensive study on the matter and had decided that the company's scope of work had fallen within the ambit of the second respondent. However as could be seen from the affidavit of the company, the company was only manufacturers of components and subcomponents and that the majority of these were not meant for the automotive industry. Based on these reasons the
H High Court found that perversity is established and that has clothed the court with the jurisdictional basis to intervene in favour of the company.

**Grounds Of Appeal**

**[10]** In their grounds of appeals, the Minister and the Union stated that the
I learned judge has erred in law and fact in his decision in holding:

(i) That the Minister of Human Resources (the appellant) had acted improperly when he did not address his mind to the relevant factors necessary to be done before he made his decision.

(ii) That Minister of Human Resources had not exercised his mind independently of the decision made by the DGIR although the law had been amended *via* Act A1322/2007 as such the decision of the Minister was tainted with illegality.

(iii) That the Minister of Human Resources had failed to consider that the competency of the Union is limited to employers who were engaged in the manufacturing, assembly and repairing motor vehicles, motorcycles, bicycles, tractors, bulldozers and parts.

(iv) That the Minister of Human Resources had decided based on the decision made by the DGIR regarding the competency of the Union.

(v) That since the company was only a manufacturer of components and sub-components and that only 46% were sub-components which could be used in the automotive industry and that the majority were not meant for the automotive industry the Minister's finding competency in favour of the Union was perverse.

**Our Decision**

**[11]** We have allowed both the appeals with costs of RM15,000 to each appellant (here and below). We also ordered that the deposit in Appeal No. 454 be refunded to the appellant/Union therein. Our reasons for allowing the appeals are as follows.

**[12]** There are three principal issues that we can culled from the grounds advanced by the appellants in these appeals. The first issue is whether the Minister had applied his mind independently in arriving at his decision to accord the recognition to the Union to represent the company's employees. The second issue is whether the Union is competent to represent the employees of the company and that the Minister was correct in deciding the competency issue in favour of the Union. The third issue is whether the Minister's decision is tainted with impropriety and illegality in that the Minister had taken into consideration irrelevant matters. The first and third issues are related and may be taken together.

**[13]** Before the High Court, Senior Federal Counsel for the Minister cited the case of *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 to support his contention that the Minister's decision cannot be faulted because it is an exercise of discretion and the discretion was exercised without improper motive unless the Minister has misdirected himself in law or had taken into consideration irrelevant matters or had not taken into account relevant matters or that his decision militates against the object of the statute. The learned Senior Federal Counsel also argued that in a judicial review the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. Therefore it was submitted that the court should not readily question the administrative decision of the Minister particularly when the decision is his absolute

A discretion. To support this proposition the learned High Court Judge was referred to the case of *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227 CA.

**[14]** However the learned High Court Judge was not persuaded by the above arguments by the appellants. In his judgment the learned judge, in B rejecting the above arguments, said as follows:

> 4. Having considered the evidence available before this Court, I must be stressed that there is nothing to be quarrelled about as far as the legal principles are concerned. Indeed the legal position as postulated by the learned Senior Federal counsel was perfectly legitimate and they represent C the current legal positions for the reasons they were cited. However, having considered the evidence before this Court, I am of the considered view that the contention of the learned counsel for the applicant had its merits and ought to succeed. To my mind, this case has not been so much a case of the Hon. Minister not exercising his discretion properly or that he had acted outside the ambit of his discretionary limits. Instead, it has D been a case where the Hon. Minister had acted improperly in the sense that he did not address his mind to the relevant factors necessary to be done before he could make any decision on the issue at hand. The finality of his decision as provided for under subsection 9(6) of the Act would only come into operation if that decision has been arrived at properly within the bounds of law. In this case, I agree with the learned counsel E for the applicant that the Hon. Minister would appear not to have exercised his mind independently of the decision of the DGIR. In fact, by the time the decision was made in 2009, the law had been amended whereby the role of the DGIR had been changed to that of merely ascertaining the circumstances pertaining to competence and not to decide F on the same. I agree with the learned counsel for the applicant in that regard and that the power to decide had been made to reside with the Hon. Minister only. The fact that the Hon. Minister had not exercised his mind in deciding the matter was quite clear in the submissions of the learned Senior Federal Counsel when it was submitted thus:
>
> > G 16. Berdasarkan maklumat ini KPKS telah memutuskan bahawa pekerja Pemohon termasuk di bawah skop keanggotaan Responden Kedua dan dengan itu layak diwakili oleh Responden Kedua.
> >
> > 17. Responden Pertama menghujahkan di dalam kes ini apabila Responden Pertama menerima keputusan KPKS, beliau telah H melaksanakan kuasa budibicara tersebut secara *bona fide* tanpa apa-apa niat *mala fide*. Responden Pertama juga telah mengambilkira semua fakta dan perkara yang relevan yang dikemukakan sebelum membuat keputusan tersebut.
> >
> > Setelah siasatan dibuat KPKS telah membuat keputusan bahawa I Responden Kedua layak mewakili pekerja pemohon kerana: ...
> >
> > 5. So, it is clear that the Hon. Minister had acted and accepted the decision that was made by the DGIR/DGTU when in law, the DGIR/DGTU, by that time was no longer empowered by the law,

> *via* the amendment, to make any decision on the issue of competence. As the Hon. Minister had acted on the decision of the DGIR/DGTU that was tainted with illegality, his 'decision' so founded was so inextricably connected with the DGIR/DGTU's decision that the Hon. Minister's decision must be deemed as tainted as well. On this ground alone, the application ought to succeed.

**[15]** Thus, by referring to the submissions by the learned Senior Federal Counsel the learned judge came to the conclusion that the Minister had not applied his mind in deciding the matter but by merely accepted and acted on the decision made by the DGIR/DGTU on the issue of competency. His Lordship also rejected the finality argument under s. 9(6) of the Act (Act 177) by the learned Senior Federal Counsel which provides that a decision of the Minister under sub-s. (5) shall be final and shall not be questioned in any court. The learned judge reasoned that finality of the Minister's decision would only come into operation if the decision has been arrived at properly within the bounds of law; and would not apply if the Minister had acted improperly by not addressing his mind to the relevant factors necessary to be done before making the decision as His Lordship found in this case.

**[16]** However upon closer scrutiny of the learned judge's judgment on this issue we find that His Lordship has not detailed the relevant factors that the Minister had failed to take into consideration in arriving at his decision besides the fact, as found by His Lordship, that the Minister had merely accepted the decision of the DGIR/DGTU. In our view the learned judge had failed to give sufficient consideration to the averments by the Minister in his Affidavit Jawapan Responden Pertama affirmed on 20 January 2011. Had the learned judge directed his mind to the averments, His Lordship would have noticed that the Minister had in fact taken into consideration all relevant factors in arriving at his decision to accord recognition to the Union to represent the company's employees. The relevant averments in the Minister's Affidavit Jawapan Responden Pertama are found in paras. 15 to 26 (both inclusive) which are reproduced below:

> 15. Saya sesungguhnya percaya dan menyatakan bahawa Peraturan 3(1) dalam Peraturan-Peraturan Responden Kedua memperuntukkan seperti berikut: "Membership of the Union shall be open to all employees excluding managerial staff, confidential staff and security guards engaged in companies manufacturing, assembling and repairing motor vehicle, motorcycles, bicycles, tractors and bulldozers and parts, who are above the age ..."
>
> 16. Saya sesungguhnya percaya dan menyatakan bahawa selepas meneliti skop keanggotaan Responden Kedua dan melihat kepada aktiviti perniagaan Pemohon, KPKS mendapati bahawa pekerja-pekerja Pemohon adalah termasuk di bawah skop keanggotaan Responden Kedua dan keputusannya adalah Pemohon layak mewakili pekerja-pekerja Responden Kedua.

17. Saya sesungguhnya menyatakan bahawa KPKS melalui surat bertarikh 18.8.2009 telah memaklumkan KPPP bahawa hasil siasatan yang dijalankan mendapati bahawa pekerja-pekerja yang digaji oleh Pemohon termasuk dalam skop keanggotaan Pemohon dan keputusannya adalah Pemohon layak mewakili pekerja-pekerja Responden Kedua.

18. Saya sesungguhnya menyatakan bahawa KPPP melalui surat bertarikh 21.1.2010 telah memanggil Pemohon dan Responden Kedua untuk menghadiri perbincangan mengenai undi sulit yang akan diadakan pada 10.3.2010. Wakil Pemohon dan Responden Kedua telah hadir.

19. Saya selanjutnya menyatakan bahawa Pemohon melalui surat bertarikh 10.3.2010 telah memaklumkan kepada KPPP mengenai pertukaran nama syarikat daripada PMG Klang Sdn Bhd kepada Diamet Klang (Malaysia) Sdn Bhd.

20. Saya seterusnya menyatakan bahawa perbincangan mengenai undi sulit telah dijalankan di mana Pemohon dan Responden Kedua telah bersetuju dengan terma-terma undi sulit dan senarai nama pengundi dengan menandatangani Surat Persetujuan.

21. Saya sesungguhnya percaya dan menyatakan bahawa KPPP telah mengeluarkan Notis Undi Sulit pada 10.3.2010 yang memaklumkan bahawa undi sulit akan diadakan pada 21.4.2010.

22. Saya sesungguhnya menyatakan bahawa undi sulit telah dijalankan pada 21.3.2010 dan keputusan undi sulit mendapati 77.3% pekerja Pemohon layak menjadi ahli kesatuan.

23. Seterusnya KPPP melalui memo bertarikh 13.5.2010 telah memaklumkan kepada saya mengenai tuntutan pengiktirafan oleh Pemohon ke atas Responden Kedua.

24. Saya sesungguhnya percaya dan menyatakan bahawa selepas meneliti laporan yang dikemukakan oleh KPKS dan KPPP dan setelah memberi pertimbangan yang sewajarnya kepada segala maklumat dan fakta relevan yang telah dikemukakan, pada 14.5.2010, saya telah menjalankan kuasa-kuasa saya di bawah Seksyen 9(5) Akta 177 dan memutuskan bahawa pengiktirafan diberi kepada Responden Kedua.

25. Saya sesungguhnya menyatakan bahawa melalui surat bertarikh 26.5.2010 keputusan saya telah dimaklumkan kepada Responden Kedua dan Pemohon oleh KPPP.

26. Saya sesungguhnya percaya dan menegaskan bahawa saya telah memberi pertimbangan sewajarnya kepada segala maklumat dan fakta relevan yang diperolehi semasa rundingan penyelesaian, yang mana kesemuanya saya percaya adalah dalam pengetahuan Pemohon, ini termasuk dokumen-dokumen yang telah dirujuk oleh Pemohon dalam Afidavit Sokongan Pemohon.

**[17]** It is obvious from the reading of the averments in the Minister's affidavit that the Minister had given consideration to the fact that there was secret ballot taken after discussions between the interested parties to determine the wishes of the company's employees to be represented by the

Union and the fact that the discussion prior to the secret balloting was attended by representatives of the Union and the company. The Minister also had given consideration to the report by DGTU/DGIR and all the relevant information and facts contained in the report. We do not see any wrong in the act of the Minister to rely on the report by the DGTU/DGIR in arriving at his decision to accord recognition to the Union as long as the Minister had applied his mind independently as to the contents of the report. The learned judge had not offered any reason why the Minister cannot rely on the report by the DGTU/DGIR. The learned judge also has not made any finding that the Minister had mechanically applied and adopted the recommendation of the DGTU/DGIR as contained in the report.

**[18]** From our reading of s. 9 of the Industrial Relations Act 1967, we are of the view that the scheme of things under the said section is that if an employer is served with a notice of recognition and the employer notifies the Union that it refuses recognition, the Union may report the matter in writing to the DGIR (s. 9(3) and 9(4) of the Act). Upon receiving the report, the DGIR may carry out enquiries to ascertain the competency of the Union to represent the employees and the percentage of employees who want to be represented. The DGIR may resort to secret ballot in order to ascertain this fact. The DGIR may conduct the enquiries himself or he may refer it to the Director General of Trade Union (DGTU) to do it – (s. 9(4A) and 9(4B) of the Act). Upon completion of the enquiries and if the matter cannot be resolved by the DGIR/DGTU, the latter shall notify the Minister and upon receipt of such notification the Minister shall give his decision thereon – (s. 9(4C) and 9(5) of the Act). Under the scheme of things therefore the Minister may rely on the report by the DGTU/DGIR as to the competency issue and made his decision thereon. We think there is nothing fanciful or unreasonable for the Minister to do so. In fact we do not think the Act envisages that the Minister himself goes to the ground to conduct the enquiries in order to ascertain the truth of the facts contained in the report that was notified to him by the DGTU/DGIR. To support this proposition we will refer to a passage in the judgment of Zaleha Zahari JCA in *Marulee (M) Sdn Bhd v. Menteri Sumber Manusia & Anor* [2007] 5 CLJ 51, at para. 36 which reads as follows:

> [36] It is common ground that the opinion and findings of the DGIR and DGTU submitted to the Minister were taken into consideration by the Minister in arriving at the decision which the Minister did under s. 9(5) of the Act. As for the appellants' argument that the Minister was not bound by the reports of the DGIR or the DGTU, and reliance on them by the Minister in arriving at the decision which he did, renders such decision as being a "rubber stamp", our views are as follows: It has been firmly established by case law that the results of investigations carried out by the DGIR and the DGTU's Department were important material to enable the DGIR in the first instance to resolve a dispute. These reports were relevant and important material in the making of a considered decision by the Minister under s. 9(5) of the Act. The submission of these

A reports to the Minister established that the Minister had been adequately informed and been appraised of all relevant facts to enable him to make a considered decision on the claim for recognition in issue which could not be resolved by the DGIR (*Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia*). The Minister was clearly entitled to rely on the reports submitted. There was no necessity for the Minister himself to
B conduct a further enquiry as contended by the appellants.

**[19]** In the circumstances, we cannot find any reason to fault the Minister's decision as being improper or unreasonable and in breach of the *Wednesbury* principles in decision making process by the executive armed with power in law to make decision as in this case. The Minister also had averred in his
C affidavit that he had considered reg. 3(1) of the Union's regulations as to the trades and class of employees that the Union can represent. In our view (and this view is supported by authorities), the DGTU/DGIR in conducting the enquiries and the secret ballot is performing an administrative to ascertain facts for consideration of the Minister – see *Syarikat Emerald Tiles Sdn Bhd*
D *v. Menteri Buruh Dan Tenaga Rakyat & Anor (The Non- Metallic Mineral Products Manufacturing Employees Union, Intervener)* [1994] 4 CLJ 906. Therefore we hold that the learned judge had erred in his conclusion on this issue.

**[20]** On the second issue – ie, the competency issue – the learned High
E Court Judge ruled that the Minister's decision in finding that the Union was competent to represent the company's employees was perversed. His Lordship's ground for so found is that the Minister had failed to have proper regard to the fact that the Union's competence is limited to employees who were engaged in the manufacturing, assembly and repairing motor vehicles,
F motorcycles, bicycles, tractors, bulldozers and parts. It was the learned judge's finding that on the affidavit evidence of the respondent (the company), the company was only a manufacturer of components and subcomponents and the majority of these were not meant for the automotive industry. On the facts the learned judge found that in 2008, 54% of the
G company's produce were for electrical, electronics, machinery and equipment industries; only 46% were subcomponents that could be used in the automotive industry.

**[21]** We have said earlier that the Minister may rely on the report by the DGTU/DGIR to make his decision. In this regard we noted that the learned
H judge had acknowledged in his judgment that the DGTU/DGIR 'had apparently done quite an extensive study on the matter and had decided that the applicant's (ie, the company's) scope of work had fallen within the ambit of the second respondent (the Union)'. Having concluded that way we do not think that it is open to the learned judge to arrive at a decision which is
I completely the opposite. The conclusion by the DGTU/DGIR in their report to the Minister that the scope of work of the company falls within the ambit of the Union's representation (see reg. 3 of the Union's regulations) is a matter of fact. The learned High Court Judge in apparent rejection of this

finding of fact by the DGTU/DGIR had not given any reason for saying so except to refer to year 2008 breakdown figures on the products given by the company to conclude that the majority of the components and subcomponents were not meant for automotive industry. But these are self-serving evidence; it must be tested against other contemporaneous evidence. We observe from the records that the company had vehemently protested against the Union representing its employees. In the company's letter to the Minister dated 18 June 2010 (exh. DKMSB32 in affidavit sokongan Toshiyuki Nagashima affirmed on 6 July 2010 – p. 283 rekod rayuan Jilid 3/4 Bahagian C), after the Minister's decision to accord recognition to the Union was communicated to the company, the latter had requested for the Minister to review the decision stating *inter alia* the following ground at para. 1 of the letter. The paragraph reads:

> 1. We had as early as June 2005 (previous claim for recognition) and again in 2007 in regard to the present claim for recognition, raised issues as to the competency of the Union to represent employees in our company. These issues and objections were raised due to the fact that the Union has been registered to represent employees engaged in "companies manufacturing, assembling and repairing motor vehicle, motorcycles, bicycles, tractors and bulldozers and parts ..." Whereas our principal business lies in the production of components and sub-components. In fact, we also produce high precision sintered metal components for electrical, electronics, machinery and equipment industries.
>
> In other words we do not produce "parts" and certainly do not have any facility to manufacture "motor vehicle, motor cycles, bicycles, tractors and bulldozers". Instead, we produce components and sub-components and these have no utility in themselves, but can be used by our final customer as a component in a "part" manufactured by them and not by us.

**[22]** However the concern and complaint by the company was apparently explained by the Union in their much earlier letter to DGTU dated 23 March 2009 (exh. R2-3 in affidavit by Gopal Krishnan a/l Nadesan affirmed for the Union on 18 November 2010 p. 328 appeal record Jilid 4/4 Bahagian C) giving information sought by the DGTU in the course of conducting the enquiries to ascertain the competency of the Union to represent the company's employees. In the letter, the Union addressed DGTU on the scope of reg. 3(1) of the Union's regulations or Constitution and stated that the word 'part' found in reg. 3(1) means, under the Union's Constitution, 'alat-alat pengganti kereta'. In one of the paragraphs of the same letter, the Union had stated that the products of the company consist of automobiles and motorcycles engines transmission parts, shock absorbers parts etc which come within the meaning of 'parts' under the Union's Constitution. The said paragraph in its original language reads;

A Syarikat ini mengeluarkan alat-alat pengganti kereta berupa "Automobile and Motorcycles Engine transmission parts, shock absorber parts", dan juga "Sintered Oiless Bearing" yang digunakan di dalam stereng kereta dan maka alat yang dikeluarkan oleh syarikat ini jatuh dalam maksud "parts".

B **[23]** We have no reason to doubt that the matters raised in the company's letter and the Union's letter quoted above had been considered and included in the report by DGTU to the Minister and the Minister had addressed his mind to them before making his decision. It is also pertinent to note that the company had agreed to a secret ballot being conducted or taken to determine whether the employees are agreeable to be represented by the Union. The C result of the secret ballot shows that 77.3% of those employees who participated had agreed to be represented by the Union. The company did not complain about the conduct or the result of the secret ballot. We also observe that the learned High Court Judge had not given due consideration to the result of the secret ballot which favours the Union to represent the D company's employees.

**[24]** Another point we would like to stress is that we are in agreement with the submission by the learned Senior Federal Counsel that the reliance by the learned High Court Judge as to the law in *Euromedical Industries Sdn Bhd lwn. Menteri Sumber Manusia & Yang Lain* [1999] 5 CLJ 171 is misplaced. In E *Euromedical Industries (supra)* there was confusion as to the findings on the Union's competency. The investigating officer in that case found that the Union there was not competent to represent the workers whilst the DGTU said that the Union was competent. Thus, the Minister in *Euromedical Industries (supra)* had based his decision on a conflicting finding of facts. The F present appeal does not have such confusion.

**[25]** As to the breakdown of the figures we agree with the submission by the learned Senior Federal Counsel that it is not the determinative factor. The learned Senior Federal Counsel cited in her written submission the G unreported High Court case of *BP Chemical (M) Sdn Bhd v. Menteri Sumber Manusia & Anor* (No. R3 (1)-25-72-07) where it was said that the membership of the fourth respondent in that case is not based on what percentage of the manufacturing process involved in the processing of chemicals but rather whether its business activity is petroleum, chemical and petrochemical based. Therefore in that case the court ruled that the investigating officer was H wrong to conclude that the fourth defendant in that case was incompetent because only 3.8% of the production involved the processing of chemical. By analogy therefore in this case the breakdown figures show that the percentage of the company products manufactured as automobile and motorcycles part is almost half of the total production in 2008. One of the facts that was I ignored by the learned judge is the main activity of the company in this appeal is to produce 15 types of subcomponents which will be used in automotive parts or components and without those subcomponents the

automotive parts or components cannot be produced or constituted. This fact coupled with other facts such as the result of the enquiry and the secret ballot would have provided the Minister with sufficient relevant factors to consider in making his decision.

**[26]** In this respect also we are in agreement with the learned counsel for the Union in his submission that in substituting the finding of fact as to the competency by the DGTU/DGIR with his own, the learned High Court Judge had stepped beyond the realm of judicial review and descended into the arena of an appeal.

**[27]** It need not be reminded that the High Court in a judicial review is exercising its inherent supervisory jurisdiction over an inferior tribunal of limited jurisdiction and not sitting as an appellate court to review the findings of the inferior tribunal. In a judicial review the court is not concerned with the decision made, unless *prima facie* the decision is illegal or in contravention of any provision of any law. Merely because the inferior tribunal got its decision wrong, is insufficient for the High Court sitting in a judicial review to interfere and substitute that inferior tribunal's decision for its own – see *Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 and *Holiday Villages Of Malaysia Sdn Bhd v. Menteri Sumber Manusia & Anor* [2010] 7 CLJ 683.

**[28]** In the circumstances, we are of the view that the learned judge had erred in his approach to the issues raised in this appeal and before His Lordship. The learned judge should have found that there was no impropriety or unreasonableness in the decision by the Minister to accord recognition to the Union (or the competency of the Union) to represent the company's employees. In our view the learned High Court judge should, in the circumstances and facts of the case give effect to s. 9(6) of the Act as to the conclusiveness and finality of the Ministerial decision on competency. The provision was inserted so as to provide some stability in the labour management and organisation in this country. Therefore the courts should be slow to find fault with the Minister's decision in exercising his discretion to accord recognition to a Union of workers.

**[29]** For the above reasons we allow the appeal and set aside the decision of the High Court in quashing the Minister's decision. We shall order the respondent to pay costs here and below in the sum of RM15,000 to each of the appellants and the deposit where applicable is to be refunded.